(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Chemical Waste Management of Indiana, Inc.	)	RCRA Appeal No. 95-4
Permittee	)	
Docket No. IND 078 911 146	)	

[Decided August 23, 1995]

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

CHEMICAL WASTE MANAGEMENT OF INDIANA, INC.

RCRA Appeal No. 95-4

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Decided August 23, 1995

Syllabus

Chemical Waste Management of Indiana, Inc. ("CWMII") has appealed certain aspects of a final permit decision by U.S. EPA Region V concerning the renewal of the federal portion of a Resource Conservation and Recovery Act ("RCRA") permit and a Class 3 modification of the same permit for CWMII's Adams Center Landfill Facility, a treatment, storage and disposal facility for hazardous waste in Fort Wayne, Indiana. When the waste stream coming into the facility contains free liquids and hazardous metal bearing wastes, CWMII must first stabilize the waste before placing it in land disposal cells. The stabilization process takes place in special stabilization buildings that are equipped with dust suppression technology. To stabilize the waste, CWMII uses two immobilization technologies called macroencapsulation and microencapsulation.

CWMII's petition raises the following issues: (1) whether Condition I.D.10., which requires CWMII to notify the Region 30 days in advance of making any physical alteration or addition to the facility, is inconsistent with 40 C.F.R. part 270, subpart D, governing changes to permits; (2) whether Condition I.D.14., which requires CWMII to notify the Region within 15 days of certain instances of noncompliance is inconsistent with 40 C.F.R. § 270.30(l)(10), which provides that a permittee shall report instances of other noncompliance at the time monitoring reports are submitted; (3) whether three permit conditions, which describe the responsibilities of permittees in their capacities as generators of hazardous waste, belong in a permit for a treatment, storage and disposal facility; (4) whether all macroencapsulation of contaminated debris should be conducted within the stabilization buildings and whether the permittee should take other measures to ensure that particulates and vapors emitted by the macroencapsulation process are controlled; (5) whether the Region has authority to require that, if microencapsulated debris are placed into the landfill as solidified masses, care will be taken so as to minimize breakage of the debris masses; (6) whether the Agency's corrective action authority provides a basis for requiring CWMII to conduct groundwater monitoring of a closed landfill at the facility, even though there has never been a release of hazardous waste from this landfill; (7) whether the Agency's corrective action authority provides a basis for requiring CWMII to impose ambient air quality monitoring for particulates and lead at the facility's perimeter; (8) whether and to what extent the Region should defer to and coordinate with State environmental officials in the regulation of air emissions from the facility; and (9) whether the open-path Fourier Transform Infrared System, the use of which is required in the permit, is an acceptable technology for monitoring volatile organic compounds.

Held: (1) In the permit proceedings below the Region did not provide a coherent rationale for requiring 30 days advanced notice before CWMII may make any physical alteration or addition to the facility; Condition I.D.10. is therefore being remanded so that the Region may either supplement its response to comments with such a rationale, or modify the requirement if it is not supportable; (2) In the permit proceedings below the Region did not provide a coherent rationale for requiring CWMII to report "other instances of noncompliance" within 15 days; Condition I.D.14. is therefore being remanded so that the Region may supplement its response to comments to provide such a rationale, or to modify the requirement if not supportable; (3) Conditions II.B.2., I.B.3., and II.B.6, which describe the responsibilities of CWMII in its capacity as a generator of hazardous waste, are drawn almost verbatim from provisions in Part 268 that are directly applicable to treatment, storage, and disposal facilities, and thus belong in a permit for such a facility; review of this issue is therefore denied; (4) CWMII has failed to carry its burden of demonstrating that the Region's concerns about particulate and vapor emissions from the macroencapsulation process are based on a clear error of fact; review of this issue is therefore denied; (5) Conditions I.D.5.a. and c., which regulate air emissions from the macroencapsulation process, are not authorized by the Agency's corrective action provisions because such gaseous emissions are not containerized and therefore do not constitute solid waste; however, it appears that the Agency would have authority to regulate such air emission under the Agency's omnibus clause; Conditions I.D.5.a. and c. therefore are being remanded so that the Region may revise its fact sheet (or statement of basis) to clarify that its statutory authority for requiring the inclusion of the challenged permit conditions is section 3005(c)(3) of RCRA (or to delete or modify such conditions if that is appropriate); (8) Condition II.D.6.f., which requires that if microencapsulated debris are placed into the landfill as solidified masses, care will be taken so as to minimize breakage of the debris masses, helps to ensure the

success of the microencapsulation process and is therefore based on and authorized by 40 C.F.R. §§ 268.45(a)(1) & Table 1 (describing performance standards of microencapsulation); review of this issue is therefore denied; (9) Conditions III.A and III.A.1, which require groundwater monitoring of a closed landfill at the facility to detect future releases, are authorized under the Agency's corrective action authority; review of this issue is therefore denied; (10) Condition III.A.2., which requires monitoring of air emissions from the perimeter of the facility and from the stabilization buildings, is not authorized by the Agency's corrective action provisions because such gaseous emissions are not containerized and therefore do not constitute solid waste; however, it appears that the Agency would have authority to regulate such air emissions under the Agency's omnibus clause; Condition III.A.2., therefore, is being remanded so that the Region may revise its fact sheet (or statement of basis) to clarify that its statutory authority for requiring the inclusion of the challenged permit condition is section 3005(c)(3) of RCRA (or to delete or modify the condition if that is appropriate); and (11) In view of the Region's obvious willingness to coordinate its efforts with the State of Indiana in regulating air emissions from the facility, the Board will not second-guess the Region's judgment as to what level of deference to, or cooperation with, the State of Indiana is appropriate; review of this issue is therefore denied. Review is also denied of CWMII's challenge to Condition I.D.5.e., relating to the use of an inert void filler in the macroencapsulation process, and CWMII's challenge to the use of the open-path Fourier Transform Infrared System for monitoring air emissions from the facility because neither issue was preserved for review. (In addition, the Region has agreed to modify or delete certain other challenged permit conditions to accommodate CWMII's concerns. Accordingly, review of such issues is also denied.)

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

On March 1, 1995, U.S. EPA Region V issued a final permit decision approving the application of Chemical Waste Management of Indiana, Inc. ("CWMII") for the renewal of the federal portion of a Resource Conservation and Recovery Act ("RCRA") permit and a Class 3 modification of the same permit for its Adams Center Landfill Facility in Fort Wayne, Indiana.[1] The Environmental Appeals Board received three petitions challenging the Region's permit decision, one filed by the City of New Haven, one filed jointly by Cheryl Hitzemann and Deanna Wilkirson, and one filed by CWMII.[2] On June 29, 1995, the Board denied review of the first two petitions. This opinion addresses the petition filed by

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[1] The State of Indiana has received authorization to administer its own RCRA program, pursuant to section 3006 of RCRA, 42 U.S.C. § 6926. Indiana has not, however, received authorization to administer the requirements contained in the Hazardous and Solid Waste Amendments to RCRA ("HSWA"). Consequently, when a RCRA permit is issued in Indiana, the State issues the part of the permit relating to the non-HSWA requirements and EPA issues the part of the permit relating to the HSWA requirements.

[2] The Board also received amicus briefs filed by the following persons: Mark Souder, U.S. Congressman, 4th District, Fort Wayne, Indiana; Archie Lunsey, Councilman, First District, Fort Wayne, Indiana; Dennis Andrew Gordon, Allen County Zoning Administrator; Elizabeth Dobynes, President, Fort Wayne Indiana Branch, NAACP; and Charles Redd, Chairman, Political Action Committee, NAACP.

CWMII. For the reasons set forth below, we are remanding four issues to the Region to supplement or revise its explanations of the challenged permit conditions or to modify those conditions. With respect to the other issues raised by CWMII, we are denying review.

I. *BACKGROUND*

A. *Statutory and Regulatory Framework*

The Adams Center Facility is a hazardous waste treatment, storage, and disposal facility, occupying approximately 151 acres of industrial zoned property in Fort Wayne, Indiana. The facility has been in operation as a waste landfill since 1974. The facility currently receives and manages an average of 1.4 million pounds of hazardous wastes per day of operation. Declaration of Becky S. Eatmon, Exhibit B, CWMII's Memorandum Seeking Immediate Denial of Petitions for Review. When the incoming waste stream contains free liquids and hazardous metal bearing wastes, CWM must first stabilize the waste before placing it in land disposal cells. The stabilization process takes place in buildings located north of the site's active waste placement cells, within 100 yards of the north property line. Attachment F, Final Permit.

Because the facility engages in "land disposal" of hazardous wastes, it is subject to stringent statutory and regulatory treatment standards and requirements. "Land disposal" includes "any placement of [a specified] hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." Section 3004(k) of RCRA, 42 U.S.C. § 6924(k). In the Hazardous and Solid Waste Amendments of 1984, Congress amended RCRA to place severe restrictions on land disposal, reflecting a congressional determination that:

> [C]ertain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes * * *.

Section 1002(b)(7) of RCRA, 42 U.S.C. § 6901(b)(7). The HSWA Amendments ban most forms of land disposal of hazardous waste, unless it can be demonstrated "to a reasonable degree of certainty, that there will be no migration of hazardous

constituents from the disposal unit or injection zone for as long as the wastes remain hazardous." Sections 3004(d)(1), (e)(1) and (g)(5), 42 U.S.C. §§ 6924(d)(1), (e)(1) and (g)(5). Land disposal is allowed, however, if the waste is first treated to meet certain treatment standards that the statute directs EPA's Administrator to promulgate. Section 3004(m) of RCRA, 42 U.S.C. § 6924(m). The treatment standards promulgated by the Administrator are meant to "substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." *Id*. The universe of wastes for which the Administrator was directed to promulgate treatment standards was divided into three broad classes. For each class of wastes, both the ban on land disposal and the treatment standards promulgated by the Administrator were to go into effect on the same date according to a staggered schedule set out in the statute. Treatment standards for the third and final class of wastes were promulgated on May 8, 1990.

The treatment standards for all covered wastes are located at 40 C.F.R. Part 268. Of particular interest for our purposes are the standards for treating hazardous debris. Hazardous debris can either be treated to meet the treatment standard developed for the particular hazardous waste that contaminates the debris or it can be treated to meet one of the alternative treatment standards specifically developed for treating hazardous debris set out at 40 C.F.R. § 268.45. The treatment technologies in section 268.45, which are set out in Table 1 of that section, are broken down into three main categories: Extraction technologies, destruction technologies and immobilization technol-ogies. Some of the issues raised in CWMII's petition relate to two immobilization technologies used by CWMII to stabilize hazardous waste: macroencapsulation and microencapsulation. Macroencapsula-tion is described in Table 1 as the:

> Application of surface coating materials such as polymeric organics (e.g., resins and plastics) or use of a jacket of inert inorganic materials to substantially reduce surface exposure to potential leaching media.

40 C.F.R. § 268.45 (Table 1). Microencapsulation is described in Table 1 as the:

> Stabilization of the debris with the following reagents (or waste reagents) such that the leachability of the hazardous contaminants is reduced: (1) Portland cement; or (2) lime/pozzolans (e.g., fly ash and cement kiln dust). Reagents (e.g., iron salts, silicates, and clays) may be added to enhance

> the set/cure time and/or compressive strength, or to reduce the leachability of the hazardous constituents.

Id. (footnote omitted).

B. *Procedural History*

The facility has been authorized to operate as a RCRA-authorized waste treatment, storage, and disposal facility since September of 1988. In 1993, CWMII requested a Class 1 permit modification to allow it to conduct "debris management" employing the immobilization technologies of macroencapsulation and microencapsulation described above. Letter from Len W. Necaise of CWMII to Hak Cho of EPA (Sept. 17, 1993), Exhibit L, Region's Response to CWMII's Petition. On March 4, 1994, the Region approved CWMII's request for this Class I permit modification. Letter from Karl E. Bremer of EPA to Leonard Necaise of CWMII (Mar. 4, 1984), Exhibit P, Region's Response to CWMII's Petition.

On October 5, 1989, CWMII applied to EPA and Indiana for a Class 3 modification to its permit, authorizing it to expand its landfill capacity ("the Phase IV expansion"). In June of 1992, the State issued the non-HSWA portion of the modification, but the permit expired on October 30, 1993, before the Agency had acted on the federal HSWA portion of the modification. Consequently, in these proceedings, CWMII seeks both a Class 3 modification and a renewal of the HSWA portion of the permit. *See* 40 C.F.R. § 270.42(c) (regulations governing Class 3 modifications). On March 1, 1995, the Region issued the final permit decision. CWMII appealed.

CWMII's petition raises the following issues:[3] (1) whether Condition I.D.10., which requires CWMII to notify the Region 30 days in advance of making any physical alteration or addition to the facility, is inconsistent with 40 C.F.R. part 270, subpart D, governing changes to permits; (2) whether Condition I.D.14., which requires CWMII to notify the Region within 15 days of any instance of noncompliance that is not specifically required to be reported under any other permit condition, is inconsistent with 40 C.F.R. § 270.30(l)(10), which provides that a permittee shall report instances of other noncompliance at the time monitoring reports are submitted; (3) whether three permit conditions, which

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[3] The petition also raises certain issues that the Region has agreed to resolve by modifying the permit to accommodate CWMII's concerns. These issues are identified *infra* in section II.H. of this opinion but will not otherwise be discussed.

describe the responsibilities of permittees in their capacities as generators of hazardous waste, belong in a permit for a treatment, storage and disposal facility; (4) whether all macroencapsulation of contaminated debris should be conducted within the stabilization buildings which are permitted by the State of Indiana and whether the permittee should take other measures to ensure that particulates and vapors emitted by the macroencapsulation process are controlled; (5) whether the Region has authority to require that, if microencapsulated debris are placed into the landfill as solidified masses, care will be taken so as to minimize breakage of the debris masses; (6) whether the Agency's corrective action authority provides a basis for requiring CWMII to continue operating ten groundwater monitoring wells that are downgradient of the closed Sanitary Landfill at the facility, even though there has never been a release of hazardous waste from this landfill; (7) whether the Agency's corrective action authority provides a basis for requiring CWMII to impose ambient air quality monitoring for particulates and lead at the facility's perimeter; (8) whether and to what extent the Region should defer to and coordinate with State environmental officials in the regulation of air emissions from the facility; and (9) whether the open-path Fourier Transform Infrared System, the use of which is required in the permit, is an acceptable technology for monitoring volatile organic compounds.

On May 22, 1995, at the request of the Board, the Region filed a response to CWMII's petition.[4]

II. *DISCUSSION*

Under the rules governing this proceeding, the Regional Administrator's permit decision ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id*. The burden of demonstrating that review is warranted is on the petitioner. *See In re Ross Incineration Services, Inc.*, RCRA Appeal No. 93-3, at 5 (EAB, Apr. 21, 1995); *In re Metalworking Lubricants Company*, RCRA Appeal No. 93-4, at 3 (EAB, Mar. 21, 1994).

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[4] On May 18, 1995, the Board also received an amicus brief filed by Cheryl L. Hitzemann, responding to CWMII's petition.

For the reasons set forth below, we conclude that four of the permit conditions challenged by CWMII should be remanded to allow the Region to reopen the permit proceedings to clarify its rationale for each of the conditions or alternatively to modify or delete the condition if an acceptable rationale does not exist. With respect to the other issues raised by CWMII's petition, the Board concludes that CWMII either failed to preserve them for review or failed to carry its burden of demonstrating that the Region's permit decision was based on a clear error or an exercise of discretion or important policy consideration that warrants review. Review of each of those issues is therefore denied.

A. *The 30-Day Waiting Period for Alterations or Additions*

Permit Condition I.D.10. requires CWMII to notify the Region 30 days in advance of making any physical alteration or addition to the facility.[5] CWMII argues that this condition is inconsistent with 40 C.F.R. part 270, subpart D, governing changes to permits. In particular, section 270.42(a)(1)(i) of subpart D allows the facility to implement certain changes, such as replacement or upgrading of functionally equivalent components, without prior notice to the Agency and then to notify the Agency seven days *after* making those alterations. This contrasts with the permit condition, which requires a 30-day waiting period before a physical alteration or addition occurs. In addition, section 270.30(l)(1) (in subpart C of part 270, listing the so-called "boilerplate" permit conditions) provides as follows: "*Planned changes*. The Permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility."

In its comments on the petition, CWMII proposed to change the language in the challenged permit condition so that it would require the facility to give notice, "to the Regional Administrator *as soon as possible (as per 40 C.F.R. § 270.30(l)(1)*) of any planned physical alterations or additions to the permitted facility before construction of such alteration or addition is commenced *except as per 40 C.F.R. § 270.42(a)."* Response to Comments at 22 (Comment 45) (emphasis indicating CWMII's proposed changes to the permit condition). The thrust of this comment is that to the extent that prior notice is required, it should

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[5] Condition I.D.10. provides as follows:

> *Reporting Planned Changes*. The Permittee shall give notice to the Regional Administrator of any planned physical alterations or additions to the permitted facility at least 30 days before construction of such alteration or addition is commenced.

only be required "as soon as possible" and only to the extent that section 270.42(a) does not permit changes without prior notice.

In its response to comments, the Region defended the 30-day notice requirement in the following response:

> It is stated at 40 C.F.R. § 270.30(l) that the Permittee shall report all instances of noncompliance *not reported* (emphasis added) under paragraphs (1), (4), (5) and (6) of this section (or 40 C.F.R. § 270.3[0(l)](1), (4), (5), and (6)) at the time that monitoring reports are submitted. Therefore the regulations contemplate that the reporting required under 40 C.F.R. § 270.30(l)(1) shall be made prior to the time that monitoring reports are submitted, if the monitoring report is not submitted as soon as the Permittee plans physical alterations or addition to the permitted facility.

Response to Comments at 23 (response to Comment 45). In its response to the petition, the Region invokes section 270.42(a)(2), which requires a permittee to receive written approval from the Agency prior to making certain Class I permit modifications set forth in Appendix I. On the basis of section 270.42(a)(2), the Region contends that the language in the permit is not inconsistent with the regulations. (We note that the Region's response to comments made no mention of section 270.42(a)(2).)

We conclude that the Region has not adequately explained its basis for requiring CWMII to give the Region 30 days advance notice before commencing an alteration or addition to the facility. In particular, we are not persuaded by the Region's belated reliance on section 270.42(a)(2). That explanation is advanced for the first time on appeal, and, as such, we are reluctant to accept it based on the present state of the administrative record.[6] The Region's response to comments

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[6] *See In re Waste Technologies Industries, East Liverpool, Ohio*, RCRA Appeal Nos. 92-7, et alia, at 11 (EAB, July 24, 1992) (Rejecting invocation of Agency's omnibus authority because: "It appears that invoking § 3005(c)(3) as legal authority for adding the Port Authority to the permit is nothing more than a *post hoc* decision by the Region in response to the Port Authority's appeal."); *In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 12-13 (EAB, Nov. 23, 1993) (Where Region's rationale for denying requested conditional remedies in permit was provided for the first time on appeal, issue was remanded for the Region to "provide a detailed explanation supported by those portions of the administrative record not currently before us indicating why conditional remedies are not appropriate, or reopen the permit proceedings to supplement the administrative record with such

(continued...)

does not address the 30-day notice requirement in the challenged permit condition. Rather, it focuses instead on why CWMII cannot wait until the monitoring report is filed before giving notice. Nor does the Region explain why the boilerplate condition at section 270.30(l)(1), requiring notice of planned alteration "as soon as possible," is inadequate for this permittee. As such, the "response to comments" is not truly responsive to CWMII's comments.

In addition, section 270.42(a)(2) does not apply to all alterations or additions to the facility covered by the permit condition, and CWMII's proposed changes to the permit, by reference to section 270.42(a), would incorporate an exception for changes governed by section 270.42(a)(2).

In sum, the Region has not articulated *any* coherent reason for requiring an absolute 30-day waiting period. There may very well be a good reason for the requirement, but it is not discernible in either the Region's response to comments or the Region's response to the petition. We are therefore remanding Condition I.D.10. to the Region so that it may reopen the permit proceedings to either supplement its response to comments with an explanation of why a 30-day waiting period is reasonable or modify the permit condition if it is not supportable.

(...continued)
information.").

B. *The 15-Day Reporting Period for Noncompliance*

Permit Condition I.D.14. requires CWMII to notify the Region of any instance of noncompliance that is not specifically required to be reported under any other permit condition.[7] Two other provisions in the permit require CWMII to report instances of actual or anticipated noncompliance: one requires CWMII to give advance notice of planned changes that may result in noncompliance and the other requires CWMII to report within 24 hours any instances of noncompliance that may endanger human health or the environment. CWMII argues that by requiring it to report other instances of noncompliance within 15 days, Condition I.D.14 does not reflect the wording in 40 C.F.R. § 270.30(l)(10). Section 270.30(1)(10), one of the boilerplate permit provisions, provides in pertinent part as follows: "*Other noncom-pliance*. The permittee shall report all instances of noncompliance not reported under paragraphs (l)(4), (5), and (6) of this section, at the time the monitoring reports are submitted."[8] Based on section 270.30(l)(10), CWMII requested in its comments on the draft permit that the language of the permit condition be changed to require that other instances of noncompliance be reported "at the time monitoring reports are submitted as per 40 C.F.R. § 270.30(l)(10)."

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[7] Permit Condition I.D.14. provides as follows:

> *Other Noncompliance*. The Permittee shall report all other instances of noncompliance not otherwise required to be reported above within 15 days of when the Permittee becomes aware of the noncompliance.

[8] Section 270.30(l)(4) provides as follows:

> *Monitoring reports*. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

Section 270.30(l)(5) provides as follows:

> *Compliance schedules*. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

Section 270.30(l)(6) provides in part as follows:

> *Twenty-four hour reporting*. (i) The permittee shall report any noncompliance which may endanger health or the environment orally within 24 hours from the time the permittee becomes aware of the circumstances * * *.

In its response to comments, however, the Region justified the 15-day reporting requirement in the same paragraph that was meant to justify the 30-day notice comment discussed above:

> It is stated at 40 C.F.R. § 270.30(l) that the Permittee shall report all instances of noncompliance *not reported* (emphasis added) under paragraphs (1), (4), (5) and (6) of this section (or 40 C.F.R. § 270.3[0(l)](1), (4), (5), and (6) at the time that monitoring reports are submitted. Therefore the regulations contemplate that the reporting required under 40 C.F.R. § 270.30(l)(1) shall be made prior to the time that monitoring reports are submitted, if the monitoring report is not submitted as soon as the Permittee plans physical alterations or addition to the permitted facility.

Response to Comments at 23 (response to Comment 45).

In its response to the petition, the Region argues that the State of Indiana has been authorized to administer the base RCRA program, and that the monitoring reports referenced in 40 C.F.R. § 270.30(l)(10) must be sent to the State of Indiana. The Region explains that it has included a "date certain" in the permit for reporting "other noncompliance" that is not tied to the time when CWMII must submit monitoring reports to the State.

As with the previous issue, we conclude that the Region did not adequately explain its reasons for including the 15-day requirement in the proceedings below. The response to comments quoted above offers no insight into the Region's thinking. In fact, it is virtually incomprehensible. The explanation in the Region's response to the petition, though more coherent, appears to have been advanced for the first time on appeal. As such, we decline to accept it.[9] In addition, it is not clear from the Region's explanation whether a 15-day notification requirement is significantly shorter than the typical period for submitting a monitoring report, or whether the submissions of monitoring reports would occur more frequently or more regularly if they were required in the federal portion of the permit, rather than in the State portion of the permit. The Region may have a perfectly good justification for the 15-day requirement, but since its response to comments does not explain what that justification is, we are remanding Condition I.D.14 to the Region so that it may reopen the permit proceedings to supplement

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[9] *See supra* n.6.

its response to comments to provide a detailed explanation of why it chose to include a 15-day reporting requirement for instances of "other noncompliance," or to modify the permit condition if an adequate basis for it does not exist.

C. *Restricted Wastes Generated at the Facility*

CWMII challenges three permit conditions requiring CWMII to test certain wastes (Condition II.B.2., Condition II.B.3., and Condition II.B.6.).[10] CWMII has requested that the permit conditions be modified to make it clear that they apply only to wastes generated at the facility. The Region has agreed to modify the three conditions to accommodate CWMII's request by adding language that makes it clear that they apply only to wastes generated by the facility.

CWMII also objects to the conditions because they merely recite CWMII's responsibilities as a generator of hazardous waste and therefore do not belong in a permit for a treatment, storage, and disposal facility. We disagree. The regulations governing the issuance of RCRA permits specifically authorize the Region to incorporate requirements from Part 268 that are applicable to treatment,

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[10] Permit Condition II.B.2. provides as follows:

> For restricted wastes with treatment standards expressed as concentrations in the waste extract, as specified in 40 C.F.R. [§] 268.41, the Permittee shall test the treatment residues, or an extract of such residues developed using the test methods described in Appendix II of 40 C.F.R. Part 261 (Toxicity Characteristic Leaching Procedure, or TCLP) to assure that the treatment residues or extract meet the applicable treatment standards of 40 C.F.R. Part 268, Subpart D. Such testing shall be performed as required by 40 C.F.R. [§] 264.13.

Permit Condition II.B.3. provides as follows:

> For restricted wastes under 40 C.F.R. [§] 268.32 or Section 3004(d) of RCRA, which are not subject to any treatment standards under 40 C.F.R. Part 268, Subpart D, the Permittee shall test the treatment residues according to the generator requirements specified under 40 C.F.R. [§] 268.32 to assure that the treatment residues comply with the applicable prohibitions of 40 C.F.R. Part 268, Subpart C. Such testing shall be performed as required by 40 C.F.R. [§] 264.13.

Permit Condition II.B.6. provides as follows:

> For restricted wastes with treatment standards expressed as concentrations in the waste, as specified in 40 C.F.R. [§] 268.43, the Permittee shall test the treatment residues (not an extract of such residues) to assure that the treatment residues meet the applicable treatment standards of 40 C.F.R. Part 268, Subpart D. Such testing shall be performed as required by 40 C.F.R. [§] 264.13.

storage, and disposal facilities.[11] The challenged conditions incorporate, almost verbatim, certain requirements in part 268 (specifically 40 C.F.R. §§ 268.7(b)(1) - 268.7(b)(3)), and these requirements are expressly applicable to treatment, storage, and disposal facilities. We conclude, therefore, that it was entirely proper for the Region to include the challenged conditions in the permit. Accordingly, we conclude that CWMII has not carried its burden of demonstrating that the challenged permit conditions are based on a clear error or an exercise of discretion or policy consideration that warrants review. Review of this issue is therefore denied.

D. *The Macroencapsulation Process*

CWMII questions the need for Permit Conditions I.D.5.a., I.D.5.c., and I.D.5.e., which provide as follows:

> a. All macroencapsulation of contaminated debris shall be conducted within the stabilization buildings which are permitted by the State of Indiana.
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> * * * * *
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> c. During macroencapsulation operations all dust emission control devices associated with the stabilization buildings are to be functioning so as to prevent the release of airborne particles outside of the stabilization buildings.
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> e. If the selected inert void filler has the potential of generating dust, the filler shall be placed into the capsules in a manner which is effective in controlling fugitive dust.

Final Permit, Exhibit G, Region's Response to Petitions. Macroencapsulation is one of the alternative treatment standards for hazardous debris listed at Table 1 of

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[11] *See* 40 C.F.R. § 270.32(b)(1) ("Each RCRA permit shall include permit conditions necessary to achieve compliance with the Act and regulations, including each of the applicable requirements specified in parts 264 and 266 through 268 of this chapter. In satisfying this provision, the Administrator may incorporate applicable requirements of parts 264 and 266 through 268 of this chapter directly into the permit or establish other permit conditions that are based on these parts.")

40 C.F.R. § 268.45.[12] CWMII has described its macroencapsulation process as follows:

> The process of macroencapsulation involves the placement of large debris items into a roll-off box that is lined with [a high density polyethylene] capsule. The separation and placement of large debris items, e.g., chunks of concrete, pipes, pieces of steel beams/rebar, etc., into the capsule lined roll-off box is not an inherently dusty operation. A Knuckle Boom Loader or similar device would be used to lift the large debris out of the delivery vehicle and place it into the capsule lined roll-off box. This operation will occur within the confines of either the North or South Stabilization Building. When the lined roll-off box is filled to capacity, void spaces within the box would have to be filled with an inert material to provide structural stability to the debris-filled capsule in the landfill.
>
> Depending on the type of inert material used to fill the void spaces between the large items of debris, some dust could be potentially generated. If a 'flowable fill' (low grade cement product) is used, no dust will be generated because of the liquid nature of the product. If vermiculite or other dry inert material were used to fill the void spaces, some dust would be generated. The amount of dust would be dependent upon the nature of the fill material. However, any dust that might be generated during the void filling process would not be a hazardous waste and would not leave the confines of the building. The dust suppression measures to be employed for this operation is the proper selection of inert void filler, i.e. 'flowable fill', asphalt chips, or other non-dusty, flowable, inert material. This material will be loaded into the lined roll-off box through a shroud or similar device to control placement of the void filler. After the void filler material is added to the lined roll-off box, the top of the capsule will be fuse-welded into place. Placement of the sealed capsule into the landfill is not a dusty operation.

Letter from Len Necaise of CWMII to Hak Cho of EPA (Dec. 9, 1993), Exhibit M, Region's Response to CWMII's Petition.

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[12] *See supra* section I.A. of this opinion.

In its petition, CWMII argues that its macroencapsulation process does not generate emissions of particulates and vapors because no treatment occurs when debris is placed in the high density polyethylene ("HDPE") capsule and because CWMII will use "flowable fill material" such as lowgrade concrete to fill the void spaces in the HDPE. CWMII also argues that the placement and handling of debris is not subject to RCRA regulation. Petition at 7-8.

In its Response to Comments, the Region defended its decision to require CWMII to conduct its macroencapsulation process in the stabilization buildings, as follows:

> [T]he macro- and microencapsulation operations carry the potential of generating emissions which may be particulate (from the debris, treatment reagents, fillers, etc.) or as chemical vapors or fumes (chemical reactions during treatment, volatilizing of organic coatings, etc.) For these reasons, the U.S. EPA maintains that the encapsulation [of] contaminated debris within the existing and future air emission controls, which are features of the Stabilization Buildings, offer[s] the best available protection for human health and the environment.

Response to Comments at 27 (response to Comment 49). The Region also notes in its response to CWMII's petition that when CWMII requested authorization to conduct macroencapsulation operations in a Class 1 permit modification request in 1993, it represented that: "This operation [macroencapsulation] will occur within the confines of either the North or South stabilization building." Letter from Len Necaise of CWMII to Hak Cho of EPA (Dec. 9, 1993), Exhibit M, Region's Response to CWMII's Petition. The Region approved the permit modification request on the condition that:

> All macroencapsulation of contaminated debris shall be conducted within the stabilization buildings which are permitted by the State of Indiana.

Letter from Karl E. Bremer of EPA to Leonard Necaise of CWMII (Mar. 4, 1984), Exhibit P, Region's Response to CWMII's Petition. The Region contends that CWMII cannot now argue that it disagrees with the Region's generalization that the macroencapsulation process has the potential of generating emissions in the form of particulate and chemical vapors and therefore must be conducted in the stabilization building.

In its response to the petition, the Region elaborates on its statement in the response to comments that "macroencapsulation operations carry the potential of generating * * * chemical vapors or fumes * * *." Response to Comments at 27 (response to Comment 49). The Region notes that a principal solidification/stabilization technique employed by CWMII is the combining of hazardous wastes with water and Portland cement or other pozzolanic (lime or silica powdered material that reacts with moisture to form a strong slow-hardening cement) to harden and stabilize the wastes. These cements harden via the process of hydration, which has the concomitant effect of chemically generating heat. The Region states that experience with such techniques in the CERCLA[13] context shows that the heat of hydration readily releases organic emissions to the air. The Region cites, for example, the possibility that concrete or brick fragments heavily stained or saturated with petroleum products and/or chlorinated solvents might be exposed to the hydration reaction of macroencapsulation, thereby liberating organic vapors. The Region also notes that CWMII is authorized to use polymeric organics (e.g., resins and plastics) as surface coating materials on the contaminated debris. The Region asserts that some polymeric organics release substantial amounts of vapor to the air, as the liquefying agents evaporate and the resins or plastics harden. Region's Response to CWMII's Petition at 11.

As a preliminary matter, we consider whether CWMII's challenge with respect to Condition I.D.5.e., relating to the use of an inert void filler, was preserved for review. In its comments on the draft permit, CWMII requested that the language of Condition I.D.5.e. be modified, but it did not request the deletion of the condition. Response to Comments at 26 (Comment 49). The implication of CWMII's comment was that if the requested modification were made, CWMII would have no objection to the inclusion of the condition in the permit. In the final permit, the permit condition contains the modification that CWMII requested. Thus, any objections to Condition I.D.5.e. raised in the petition are new and were not raised during the comment period. To preserve an issue for appeal, however, the issue must have been raised during the comment period or petitioner must demonstrate that it could not have raised the issue at that time because the issue was not reasonably ascertainable. *See* 40 C.F.R. § 124.19(a) ("The petition shall include a * * * demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations * * *."). We conclude, therefore, that the issue as raised in the petition was not preserved for review. *See* 40 C.F.R. §§ 124.13 & 124.19(a) (an

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[13] CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act, more popularly known as "Superfund." 42 U.S.C. §§ 9601 *et seq*.

issue that is reasonably ascertainable during the comment period must be raised at that time by someone if it is to be preserved for review). *In re Masonite Corporation*, PSD Appeal No. 94-1, at 11, n.9 (Nov. 1, 1994).

With respect to the other two issues relating to macroencapsulation, we conclude that CWMII has failed to carry its burden of demonstrating that the challenged permit conditions are based on clear error or an exercise of discretion or policy consideration that warrants review. The Region has presented persuasive reasons why it believes that the macroencapsulation process is capable of generating vapors. CWMII has offered nothing to cast doubt on the Region's reasons. Moreover, in the description of CWMII's macroencapsulation process quoted above, CWMII admits that the process could emit particulates depending on the type of inert filler used to fill the empty space in the HDPE capsule. CWMII represents that it plans to use a type of filler that does not generate particulate emissions, but the permit does not mandate the use of such filler, and there is nothing to prevent CWMII from switching to the type of filler that does generate particulate emissions.[14] In sum, we are not persuaded that the Region's concerns about vapor and particulate emissions are based on clear error of fact.

CWMII also contends that the Region lacks statutory authority to regulate the placement and handling of hazardous debris. The Region's regulation of the placement and handling of hazardous debris, however, is simply a way of regulating air emissions generated by the macroencapsulation process. As authority for regulating such air emissions, the Region cites its corrective action authority under section 3004(u) of RCRA and its implementing regulation at 40 C.F.R. § 264.101. These corrective action provisions, however, only apply if there is a release of a hazardous waste from a solid waste management unit ("SWMU"). In order to meet the definition of hazardous waste, a substance must first meet the definition of solid waste. 40 C.F.R. § 261.3(a) (definition of hazardous waste). Section 1004(27) of RCRA defines "solid waste" to include "contained gaseous material" from industrial operations. "The Agency has interpreted this explicit inclusion of containerized gaseous materials as constituting an implicit exclusion of uncontainerized gas." *In re BP Chemicals of America Inc., Lima Ohio*, RCRA Appeal No. 89-4, at 3-4 (Adm'r, Aug. 20, 1991). Thus, a substance in gaseous

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[14] We also note that CWMII does not address in its appeal the statement it made when it first requested a permit modification to the effect that it intended to conduct the macroencapsulation process in the stabilization buildings. If it was a good idea to conduct the macroencapsulation process in a stabilization building then, why is it no longer a good idea to continue the practice? CWMII represents that the process would now be carried out in "containment areas," but it is not clear whether these containment areas would adequately protect against particulate and vapor emissions.

form is not considered a solid waste under RCRA unless it is containerized. *Id*. at 5. Because the air emissions that the Region seeks to regulate are not containerized, they would not meet the definition of solid waste and therefore would not constitute hazardous waste. The corrective action provisions, therefore, do not apply to the air emissions and do not provide authority for the challenged permit conditions.

Nevertheless, the Agency does have authority to regulate such air emissions under the Agency's omnibus authority at section 3005(c)(3) of RCRA, 42 U.S.C. § 6925 (and its implementing regulation at 40 C.F.R. § 270.32(b)(2)), provided the following two conditions are met: (1) There must be an adequate nexus between the air emissions and the hazardous waste management activities being carried out at the facility, and (2) the challenged conditions must be necessary to protect human health and the environment within the meaning of the omnibus clause at section 3005(c)(3) of RCRA.

The required nexus between uncontainerized air emissions and hazardous waste management activities was discussed in *BP Chemicals* decision cited above. In that case, the Administrator made the following observations on the subject:

> There are, of course, situations where the proper regulation of hazardous waste management requires permit terms that address materials that are not hazardous waste. For example, a RCRA permit may properly regulate cigarette smoking at a hazardous waste management facility where smoking poses a threat to flammable hazardous waste. On the other hand, the permit could not include restrictions on smoking based exclusively on health risks to the smoker posed by smoking itself because such risks do not have an adequate nexus to hazardous waste management. To take a more pertinent example, the Agency may regulate air emissions associated with hazardous waste management, as well as emissions from equipment that contains or contacts hazardous waste derivatives, even though such emissions might not be solid waste. These emissions are subject to RCRA regulation because they pose risks that are ultimately tied to hazardous waste management.

BP Chemicals at 7-8 (footnote omitted).

In this case, the emissions that prompted the inclusion of the challenged conditions are clearly "associated with hazardous waste management activities," within the meaning of the quoted passage. Such emissions will be generated by the

macroencapsulation process, a treatment method specifically listed as an alternative treatment standard for hazardous debris under the land disposal restrictions of part 268. We conclude, therefore, that under the standard articulated in *BP Chemicals*, set out above, an adequate nexus exists in this case between the challenged permit conditions and hazardous waste management activities carried out at the facility.

The challenged permit condition must also meet the requirements of the omnibus clause at Section 3005(c)(3) of RCRA. That provision authorizes the Agency to include permit conditions that are not explicitly authorized by other regulations.[15] Such authority, however, may only be exercised if the record contains a properly supported finding that the permit condition is necessary to protect human health or the environment.[16] As previously noted, the Region's Response to Comments includes the following finding relating to the challenged permit conditions:

> [M]acro- and microencapsulation operations carry the potential of generating emissions which may be particulate (from the debris, treatment reagents, fillers, etc.) or as chemical vapors or fumes (chemical reactions during treatment, volatilizing of organic coatings, etc.). For these reasons, the U.S. EPA maintains that the encapsulation [of] contaminated debris within the existing and future air emission controls, which are features of the Stabilization Buildings, offer[s] the best available protection for human health and the environment.

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[15] Section 3005(c)(3) provides in pertinent part as follows:

> Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

42 U.S.C. § 6925(c)(3).

[16] *See In re Sandoz Pharmaceuticals Corporation*, RCRA Appeal No. 91-14, at 7 (July 9, 1992) ("Accordingly, the Region may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health and the environment."); 56 Fed. Reg. 7147 (Feb. 21, 1991) ("EPA notes that permit writers choosing to invoke the omnibus authority of § 270.32(b)(2) to add conditions to a RCRA permit must show that such conditions are necessary to ensure protection of human health and the environment and must provide support for the conditions to interested parties and accept and respond to comment. In addition, permit writers must justify in the administrative record supporting the permit any decisions based on omnibus authority.").

Response to Comments at 27 (response to Comment 49). The above-quoted finding suggests that there exists a sufficient basis for an exercise of the Agency's omnibus authority.[17]

Thus, it appears that the Region does have a sufficient statutory basis for including the challenged permit conditions, namely the omnibus clause at section 3005(c)(3) of RCRA. The problem is that the Region did not invoke section 3005(c)(3) as justification for the challenged permit conditions. As noted above, it erroneously relied instead on its corrective action authority under section 3004(u) of RCRA. The practical significance of this error may be slight, since an exercise of the Agency's corrective action authority also requires a finding that the permit condition is necessary to protect human health and the environment. *See In re American Cyanamid Company, Kalamazoo, Michigan*, RCRA Appeal No. 89-8, at 14, n.26 (Adm'r, Aug. 5, 1991) ("[T]he Region's finding that corrective action is necessary under §3004(u) also demonstrates that corrective action is necessary for the protection of human health and the environment for purposes of §3005(c)(3)."). Nevertheless, it is conceivable that CWMII's comments on, and challenge to, the permit conditions might have taken a different form, but for the Region's erroneous reliance on its corrective action authority. We are therefore remanding Conditions I.D.5.a. and c. On remand, assuming the Region wants to retain these conditions, the Region is directed to revise its fact sheet (or statement of basis) accompanying the draft permit as necessary to clarify that the Region's statutory authority for requiring the inclusion of the challenged permit conditions is section 3005(c)(3) of RCRA and to make the findings necessary to invoke that authority. (While we assume the Region will make such findings and invoke such authority, it is of course free to withdraw the permit conditions if for some reason it decides it must do so.)[18]

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[17] The Region concedes that it based its decision to include the challenged permit conditions on two conversations with officials of Indiana's environmental regulatory agency, but did not include any mention of such conversations within the administrative record for the permit. We consider this harmless error. The gist of the conversations was that the State of Indiana's efforts to regulate air emissions from the facility would not obviate the need for the challenged permit conditions. In its response to comments, however, the Region had arrived at the same conclusion based on information that was *not* obtained during the two conversations. *See* Response to Comments at 34 (response to Comment 56), Exhibit J, Region's Response to Petitions. In any event, the Region will have the opportunity to supplement the record on remand.

[18] If the Region determines that it has statutory authority under the omnibus clause at section 3005(c)(3) to include the challenged permit conditions, it must reopen the record for comment on this determination. *See In re Adcom Wire, D/B/A/ Adcom Wire Company*, RCRA Appeal No. 92-2, at 8 (EAB, Feb. 4, 1994)(Order on Reconsideration)

(continued...)

E. *The Microencapsulation Process*

> CWMII challenges Permit Condition II.6.f., which provides as follows:
>
> > If microencapsulated debris are placed into the landfill as solidified masses, care will be taken so as to minimize breakage of the debris masses.

As noted above, microencapsulation is one of the alternative treatment standards for hazardous debris listed at Table 1 of 40 C.F.R. § 268.45.[19] The purpose of the process is to stabilize the debris to reduce leachability of the hazardous contaminants contained therein.

In its comments on the draft permit, CWMII requested the deletion of Condition II.6.f., arguing that: "[T]his condition is not applicable and has no regulatory requirement associated with it." Response to Comments at 30 (Comment 50). In its petition, CWMII similarly argues that: "The permit condition as written is arguably not applicable to the microencapsulation process and therefore does not apply as a permit condition." Petition at 8.

The Region responds that the challenged permit condition is meant to reduce the leachability of hazardous contaminants in and on the debris by minimizing the breakage of encapsulating materials through careless handling. The Region emphasizes that:

> Condition II.D.6.f. requires the Permittee to *minimize* breakage, rather than *require* that the Permittee ensure that absolutely no breakage will occur. That is, Region 5 is setting a realistic permit condition which requires the Permittee to exercise reasonable care when disposing of microencapsulated debris to

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(...continued)
(requiring Region to reopen record for comment on jurisdictional determination).

[19] The microencapsulation process is described in Table 1 of section 268.45 as follows:

> *Microencapsulation*: Stabilization of the debris with the following reagents (or waste reagents) such that the leachability of the hazardous contaminants is reduced: (1) Portland cement; or (2) lime/pozzolans (e.g., fly ash and cement kiln dust). Reagents (e.g., iron salts, silicates, and clays) may be added to enhance the set/cure time and/or compressive strength, or to reduce the leachability of the hazardous constituents.

(Footnote omitted.)

> minimize a potential danger to human health and the environment.

Region's Response to Petition at 18. As regulatory authority for the condition, the Region cites Table 1 of 40 C.F.R. § 268.45, discussed above.

We agree with the Region. The goal of microencapsulation is to reduce the leachability of hazardous contaminants in and on hazardous debris. Condition II.D.6.f. helps to ensure the success of microencapsulation by minimizing the chance that encapsulating materials will break, thereby exposing hazardous contaminants. We conclude, therefore, that Condition II.D.6.f. is based on, and authorized by, 40 C.F.R. § 268.45(a)(1) & Table 1 (describing performance standards of microencapsulation). According, we conclude that CWMII has failed to demonstrate that the challenged permit condition is based on a clear error or involves an exercise of discretion or a policy consideration that warrants review. Review of this issue is therefore denied.

F. *Groundwater Monitoring Requirements*

CWMII challenges Permit Conditions III.A. and III.A.I., which require CWMII to continue operating ten groundwater monitoring wells that are downgradient of the closed Sanitary Landfill at the facility.[20] CWMII has been voluntarily monitoring these ten wells as part of its groundwater monitoring program for the past several years; however, it now wishes to discontinue this practice. CWMII notes in its petition that it has completed an Investigative Workplan study of the Sanitary Landfill unit and has voluntarily collected additional groundwater data related to the unit. On the basis of these data, CWMII asserts that "there has been no release from the Sanitary Landfill unit." CWMII Petition at 9. CWMII also correctly points out that the Region, in its response to comments, concedes that no release has been detected to date from the Sanitary Landfill. Response to Comments at 33 (response to Comment 55). CWMII argues that the

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[20] Conditions III.A. and III.A.1. provide as follows:

> 1. The Permittee shall continue to implement a ground water monitoring workplan to document any evidence of a release of hazardous waste or hazardous constituents to the ground water from the Sanitary Landfill. The contents of the Workplan are found in the Attachment C.
>
> a. All data generated by the continued ground water monitoring of the Sanitary Landfill shall be submitted in their entirety to the U.S. EPA.

only conceivable regulatory authority for ordering the continued operation of the groundwater monitoring wells is the Agency's corrective action authority at 40 C.F.R. § 264.101.[21] CWMII argues, however, that because there has been no release from the Sanitary Landfill, the Agency's corrective action provision, which applies to releases of hazardous waste, does not provide authority for the challenged permit conditions.

In its comments on the draft permit, CWMII requested that it not be required to continue operating the groundwater monitoring wells. The Region, however, rejected the request, explaining that:

> [T]he bottom and sides of the Sanitary Landfill are unlined natural soil, and that "special" industrial wastes have been disposed there, before the effective date of the RCRA statute. Although no release has been detected, to date, from the Sanitary Landfill, the U.S. EPA remains very concerned about potential releases of hazardous wastes or constituents from the Sanitary Landfill.
>
> Because of the U.S. EPA's concerns, as stated above, regarding this potential threat to human health and the environment, the U.S. EPA has a basis for determining whether and to what extent corrective measures are needed to protect human health and the environment in accordance with RCRA Section 3004(u).

Response to Comments at 33 (response to Comment 55), Exhibit J, Region's Response to Petitions. In its response to the CWMII's petition, the Region essentially repeats its response to comments and again invokes section 3004(u) as authority for the challenged permit condition.

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[21] Section 264.101(a) provides as follows:

> The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment *for all releases of hazardous waste or constituents* from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.

(Emphasis added.)

The Region's response to comments presents what appear to be well-founded concerns about potential releases from the Sanitary Landfill unit. CWMII's petition does not point to any information in the record that would cause us to question the Region's position. We conclude, therefore, that the CWMII has not met its burden of demonstrating that the challenged permit condition is based on a clear error of fact.

Nor are we persuaded by CWMII's legal argument that the Region has no authority to regulate the unit because no release from the unit has been detected. The purpose of the monitoring requirement is to detect *future* releases of hazardous waste. The Agency's corrective action authority under section 3004(u) is broad enough to require a permittee to monitor for future releases, at least in some circumstances. The circumstances in which such monitoring would be appropriate were discussed in the case of *In re Envirosafe Services of Idaho, Inc.*, RCRA Appeal No. 88-41 (Adm'r, Apr. 3, 1990). In that case, the permit in question required Envirosafe Services to monitor specified existing wells and to construct and monitor a number of new wells to detect any future releases from more than 30 SWMUs at the facility. The Administrator held that: "Apart from the authority to require investigation of existing releases, however, the Region has legal authority under RCRA §3004(u) to require groundwater monitoring to detect *future* releases from SWMUs. *See* 52 Fed. Reg. 45,789 (December 1, 1987)." *Id.* at 9. The Administrator also made the following observations:

> The 1987 preamble [cited above] suggests that monitoring will be required where a SWMU is likely to have a future release, but this assertion should not be read to overstate the evidentiary threshold needed for future release monitoring. RCRA §3004(u) was intended to apply to releases that occur after permit issuance. *See* S. Rep. No. 284, 98th Cong., 1st Sess. 32 (1983); 53 Fed. Reg. at 45,789. Its terms are broad enough to authorize monitoring for future releases as necessary to protect human health and the environment, particularly when read in conjunction with the Agency's omnibus authority * * *. The record in a given case might not allow for a conclusive finding that a future release is likely to occur, but might nevertheless reveal a serious or substantial risk of a future release that warrants monitoring to protect human health and the environment.

Id. at 9-10, n.13. Under the standard articulated in *Envirosafe*, we conclude that the challenged permit condition is authorized under the Agency's corrective action

authority. The Region's response to comments includes a statement that the permit condition is necessary to protect human health and the environment, which statement is supported by an adequate factual basis indicating that a future release may occur. We therefore conclude that the challenged permit conditions are authorized under section 3004(u) of RCRA. Review of this issue is therefore denied.

G. *Ambient Air Quality Monitoring Requirements*

CWMII challenges the necessity for Permit Condition III.A.2., which provides as follows:

> The Permittee shall implement ambient air monitoring at the facility. The ambient air monitoring shall meet the workplan found in Attachment E and shall implement the ambient air study for inorganic compounds as found in Attachment F.

Attachment E, mentioned above in the quoted permit condition, requires implementation of an ambient air monitoring plan for particulates and lead at the perimeter of the facility, and Attachment F requires implementation of an ambient air monitoring study designed to measure the extent to which volatile inorganic compounds (e.g., ammonia, hydrogen chloride, hydrogen cyanide, hydrogen sulfide, and sulfuric acid mist) may be emitted during the stabilization process. In its comments on the draft permit, CWMII requested the deletion of Condition III.A.2.:

> CWMI has submitted an application for the registration of source emissions, to the IDEM, which is claimed to moot Attachment E. Also CWMI is in the process of enclosing the Stabilization Buildings and adding an air pollution control system, which is claimed to moot the need for Attachment F.

Response to Comments at 34 (Comment 56).

In its response to Comment 56, the Region rejected CWMII's request, arguing that the monitoring required in Attachment E is necessary to protect human health and the environment. Attachment E is designed to address migration of airborne particulate emissions off-site, providing valuable data regarding both the effectiveness of dust suppression measures at the facility and the potential impact of off-site particulate emissions upon the surrounding community. To achieve this purpose, Attachment E requires the use of several particulate collection stations around the perimeter of the landfill. Indiana's regulation of individual air emissions sources at the facility will not supply the Region with comparable monitoring information. With respect to Attachment F, the Region noted that CWMII's proposed pollution control equipment in its stabilization buildings will be designed for the control of particulate matter only, while the air monitoring study of emissions from the stabilization buildings called for in Attachment F will address airborne chemical vapors as well. The Region believes that implementation of Attachment F will be valuable for the collection of data to protect human health and

the environment. For all these reasons, the Region decided to leave Attachments E and F in the permit.

On appeal, CWMII raises three objections to Permit Condition III.A.2., as follows: (1) The Region has no authority under RCRA to impose *facility* ambient air quality monitoring; (2) CWMII is working with the State of Indiana under the Clean Air Act to address air emissions issues from the stabilization process on-site, and USEPA ought to defer to, and coordinate with, IDEM's regulatory effort; (3) The open-path Fourier Transform Infrared System described in Attachment F is barely beyond bench-scale testing and is not an accepted scientific basis for monitoring volatile organic compounds.

With respect to the first issue, it appears that the Region has sufficient statutory authority to support the challenged monitoring requirements. However, as with the permit conditions relating to macroencapsulation (discussed in section D above), we conclude that the Region has invoked an inapplicable statutory authority. As its authority for requiring the challenged air monitoring requirements, the Region has invoked the corrective action provision at section 3004(u) of RCRA. The air emissions subject to the monitoring requirements, however, will not be containerized, so they will not constitute releases of hazardous waste. The Agency's corrective action authority, therefore, does not apply.

As noted earlier, however, noncontainerized air emissions may be regulated under the Agency's omnibus clause at section 3005(c)(3) of RCRA, 42 U.S.C. § 6925, provided the record contains a properly supported finding that such regulation is necessary to protect human health or the environment and provided there is an adequate nexus between the air emissions and the hazardous waste management activities carried on at the facility. In this case, the air emissions that the Region seeks to regulate will be generated by the macroencapsulation and microencapsulation processes to be conducted in the stabilization buildings. These two processes are specifically listed as alternative treatment standards for hazardous debris at 40 C.F.R. § 268.45 (Table 1). The air emissions to be monitored, therefore, have a clear nexus to the hazardous waste management activity being carried out at the facility.

As for the Agency's omnibus authority, the Region included in its response to comments a finding that the ambient air monitoring required in Attachments E and F is necessary to protect human health and the environment. The response to comments also includes sufficient factual information to support the Region's finding. It appears, therefore, that the Region has sufficient statutory authority to include the challenged permit conditions.

Unfortunately, the Region did not invoke the Agency's omnibus authority at section 3005(c)(3). It relied instead on the Agency's corrective action authority. On remand, assuming the Region wants to retain these conditions, the Region is directed to revise its fact sheet (or statement of basis) accompanying the draft permit as necessary to clarify that the Region's statutory authority for requiring the inclusion of the challenged permit conditions is section 3005(c)(3) of RCRA. (While we assume the Region will want to invoke such authority, it is, of course, free to withdraw the permit condition, if for some reason it decides it must do so.)[22]

With respect to CWMII's second argument -- that the Region should coordinate its efforts with, and defer to, the regulatory efforts of the State of Indiana -- we note that the Region, in its Response to Comments, stated that it would "evaluate any State requirements to avoid conflicting Federal and State requirements." Response to Comments at 34. Moreover, the Region represents that it has been in communication with State officials to determine whether the State's regulatory efforts have obviated the need for ambient air monitoring in the RCRA permit. In view of the Region's obvious willingness to coordinate its efforts with the State of Indiana to avoid duplicative requirements, we decline to second-guess the Region's judgment as to what level of deference to, or cooperation with, the State of Indiana is appropriate.[23]

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[22] If the Region determines that it has statutory authority under the omnibus clause at section 3005(c)(3) to include the challenged permit condition, it must reopen the record for comment on this determination. *See supra* n.18.

[23] *See In re Metalworking Lubricants Company*, RCRA Appeal No. 93-4, at 6 (EAB, Mar. 21, 1994) (where permittee had already done corrective action work in response to a State enforcement action, Board denied review of permittee's concerns about duplicative corrective action requirements, because the Region had indicated that the permittee could submit work done for the State as a means of at least partially satisfying its permit requirements); *In re Beazer East, Inc. and Koppers Industries, Inc.*, RCRA Appeal No. 91-25, at 10 (EAB, Mar. 18, 1993) (where permittee had already done corrective action work for the State, Board denied review of permittee's concerns about duplicate corrective action requirements, because Region had evidenced willingness to take advantage of [the permittee's] prior efforts and to consider the data generated to date in determining whether [the permittee] has satisfied the permit's corrective action requirements); *In re General Electric Company*, RCRA Appeal No. 91-7, at 8 (EAB, Nov. 6, 1992) ("We believe the Region should be accorded a large measure of discretion in determining the appropriate level of and mechanism for cooperation with State programs. It is sufficient that the Region has evidenced a good faith willingness to coordinate its efforts with those of Massachusetts consistent with Agency policy. Having made that determination, we will not second-guess the Region's judgment as to the particular mechanism used to effect such cooperation."}; *In re General Motors Corporation*, RCRA Consolidated Appeal Nos. 90-24, 90-25, at 9 (EAB, Nov. 6, 1992) (Board denied review because the Region had agreed to consider all data generated by the permittee through the ongoing remediation efforts it has conducted with the approval of all State and local officials).

We also reject CWMII's third argument, that the open-path Fourier Transform Infrared System described in Attachment F is barely beyond bench-scale testing and is not an accepted scientific basis for monitoring volatile organic compounds. The Region argues that this issue was not raised during the comment period and, accordingly, may not be raised at this stage of the proceedings. We agree. CWMII did not demonstrate in its petition either that it raised the issue during the comment period or that the issue was not reasonably ascertainable at the time, as it is required to do under the procedural rules governing appeals.[24] We conclude, therefore, that the issue has not been preserved for review. *See* 40 C.F.R. §§ 124.13 & 124.19(a) (an issue that is reasonably ascertainable during the comment period must be raised at that time by someone if it is to be preserved for review). *In re Masonite Corporation*, PSD Appeal No. 94-1, at 11, n.9 (Nov. 1, 1994).[25]

H. *Permit Modifications In Response to Petition*

The Region has agreed to modify the following conditions in accordance with CWMII's objections:

> -- Conditions II.D.1.a. and b. (the Region will remove these provisions altogether);

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[24] *See* 40 C.F.R. § 124.19(a) ("The petition shall include a * * * demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations * * *.) Our review of the record confirms that there is no indication that CWMII objected to the challenged technology during the comment period.

[25] We note that Attachment F requires a study of emissions of volatile *inorganic* compounds, whereas CWMII argues that the Open-Path Fourier Transform Infrared Spectrometer system is not an accepted method of measuring volatile *organic* compounds. CWMII also cites Method 25D at 40 C.F.R. Part 60 , Appendix A, which is a measurement method designed to determine the volatile organic concentration of waste samples. Because the issue has not been preserved for review, however, we need not determine the significance, if any, of this discrepancy.

We also note the Region's assertion that CWMII itself proposed the technology that it is now challenging. Region's Response to CWMII's Petition at 22. It is hard to know how much weight to give this assertion for two reasons. First, in support of its assertion, the Region cites page one of Attachment F. The text on the cited page indicates that CWMII contracted with Midwest Research Institute ("MRI") to perform the study and that MRI "will use a Midac portable Fourier transform infrared (FTIR) spectrometer to monitor emissions of these compounds." The implication of the Region's argument is that it was CWMII's contractor, not the Region, who chose to use the challenged technology. Attachment F, however, does not provide any direct support for this implication other than the statement that MRI will use the technology. Second, the Region contends that CWMII proposed the technology for the purpose of monitoring "volatile organic compounds," even though the purpose of Attachment F is to monitor emissions of *in*organic compounds. In any event, because this issue was not preserved for review, we need not determine who proposed the use of the challenged technology.

-- Conditions II.D.2.a. and b. (the Region will remove these provisions altogether);
-- Condition II.E.6. (the Region will correct a typographical error);

-- Condition IV.B.4. (the Region will add a definition of the term "storm").

Accordingly, we are denying review of such objections.

III. *CONCLUSION*

For all the foregoing reasons, we are remanding the following permit conditions to the Region: (1) Condition I.D.10., so that the Region may supplement its response to comments with an explanation of why a 30-day waiting period is reasonable (or modify the requirement if not supportable); (2) Condition I.D.14., so that the Region may supplement its response to comments to provide an explanation of why it chose to include a 15-day reporting requirement for instances of "other noncompliance" (or modify the requirement if not supportable); (3) Conditions I.D.5.a. and c., so that the Region may revise its fact sheet (or statement of basis) to clarify that its statutory authority for requiring the inclusion of the challenged permit conditions is section 3005(c)(3) of RCRA (or modify or delete the condition if not supportable); (4) Condition III.A.2., so that the Region may revise its fact sheet (or statement of basis) to clarify that its statutory authority for requiring the inclusion of the challenged permit condition is section 3005(c)(3) of RCRA (or modify or delete the condition if not supportable).[26] With respect to the other issues raised in CWMII's petition, the Board concludes that CWMII either failed to preserve them for review or failed to carry its burden of demonstrating that the Region's decision is based on a clear error of fact or law or an exercise of discretion or important policy consideration that warrants review. Review of each of those issues is therefore denied.

So ordered.

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[26] Although section 124.19(c) of the procedural rules governing this appeal contemplates that additional briefing will be submitted upon the grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear that further briefs on appeal would shed light on the issues to be addressed on remand. *See, e.g.*, *In re Exxon Company, U.S.A. (Baton Rouge Refinery)*, RCRA Appeal No. 94-8, at 19, n.15 (EAB, May 17, 1995); *In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 34, n.38 (EAB, Nov. 23, 1993); *In re Sandoz Pharmaceuticals Corporation*, RCRA Appeal No. 91-14, at 13, n.11 (EAB, July 9, 1992).

Upon completion of the remand proceedings, CWMII will not be required to appeal to the Board to exhaust its administrative remedies. For purposes of judicial review, the Region's actions on remand will constitute final agency action. *See* 40 C.F.R. § 124.19(f)(1)(iii).